(2)

No. 01-1868

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CLARA M. BROWN,

Petitioner,

v.

TOKIO MARINE AND FIRE INSURANCE CO., LTD. and TOYOTA MOTOR SALES U.S.A., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondents Tokio Marine and Fire Insurance Co., Ltd. and Toyota Motor Sales, U.S.A., Inc. state:

1. Respondent Toyota Motor Sales U.S.A., Inc. is wholly owned by Toyota Motor North America, Inc.; and

2. Respondent Tokio Marine and Fire Insurance Co., Ltd. is a Japanese corporation, does not have a parent company and no publicly held corporation owns 10% or more of its stock.

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REASONS FOR DENYING THE WRIT

Without exception, every Circuit Court of Appeals presented with the issue has ruled that the one-year time limit for removal applies only where the "initial pleading is not removable," and does not apply to cases like this one that are removable when filed. This is because the plain language of 28 U.S.C.A. § 1446(b), establishing time limits for seeking removal, distinguishes between cases that are initially removable like this one and those that are not. *See, e.g., Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998) (holding that, by its express terms, one-year limitation in the second paragraph of § 1446(b) only applies where the "initial pleading is not removable").

Section 1446(b), by its express language, provides two alternative time limits in separate paragraphs. The first paragraph (which is controlling here) applies to cases that are removable when filed requiring removal within 30 days of service, with each defendant permitted a full 30 days to effect removal. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (30-day period under first paragraph of § 1446(b) begins upon formal service); *Marano Enterprises v. Z-Teca Resaurants, et al.*, 254 F.3d 753, 756-57 (8th Cir. 2001) (each defendant has its own 30-day period to effect removal, rejecting "first-served" rule). The second paragraph, which includes the one-year limitation, applies only to those cases that are not initially removable, but later "become removable":

> (b) The notice of removal of a civil action or a proceeding shall be filed within thirty days after the receipt by the defendant, through

> service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> **If a case stated by the initial pleading is not removable**, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of this action.

28 U.S.C. § 1446(b) (emphasis added).

Thus, even where the newly-added Toyota was not served until 16 months after the lawsuit was filed, its removal within 30 days of service (with the consent of Tokio Marine) was timely. It is notable that the original defendant, respondent Tokio Marine, sought removal at the outset but that removal was deemed untimely because the district court applied the "actual receipt" rule, now abrogated by this Court in *Murphy Bros., Inc., supra*. Had the district court applied the "service rule" dictated by *Murphy*, Tokio Marine's removal would have been successful. *See* Pet. App. C at p. 18a; and Pet.

App. D at p. 21a. In any event, the district court properly denied Petitioner's motion for remand following Toyota's removal at issue here, holding that the one-year rule did not apply.

Despite unanimity among the circuits, Petitioner seeks review on certiorari claiming that the 8th, 5th, 6th, and 9th Circuit's interpretation of § 1446(b) is in "direct conflict" with (1) this Court's prior decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996); (2) "a number of district court decisions"; and (3) the "express language" of § 1446(b). Not only are there no conflicts, but there are certainly no "compelling reasons" justifying review of this issue under S. Ct. Rule 10 either.[1]

I. THE 8th CIRCUIT'S JOINDER IN THE 5th, 6th AND 9th CIRCUITS' REJECTION OF THE ONE-YEAR RULE IN CASES THAT ARE INITIALLY REMOVABLE DOES NOT CONFLICT WITH *CATERPILLAR*.

Without further discussion or analysis, plaintiff relies on a single sentence quoted out of context from *Caterpillar* for the notion that the one-year rule applies to all diversity cases, rather than just to those that later become removable. Pet. at 5. But in *Caterpillar*, this Court was not dealing with the situation where the case was initially removable as here (governed by the first paragraph of § 1446(b)), nor was it attempting to define the scope of the one-year rule.

Instead, the *Caterpillar* court was called on to construe only the *second* paragraph of § 1446(b), containing the

1. Petitioner does not seek review of the insurance coverage or automobile lease questions resolved by the 8th Circuit in favor of respondents.

one-year limitation, because the case was "non-removable at the lawsuit's start." *Caterpillar*, 519 U.S. at 65. And, in particular, the question answered was whether the absence of complete diversity at the time of removal was fatal to jurisdiction if, at the time of trial, complete diversity existed. *Id.* at 64. Within one-year of suit being filed, Caterpillar removed the case from state court after a settlement was reached between plaintiff and a non-diverse defendant. *Id.* While the settlement between the plaintiff and the non-diverse defendant did not achieve complete diversity because of another pending subrogation claim against the non-diverse defendant, the district court nevertheless incorrectly denied plaintiff's motion for remand. *Id.* at 66-67. After further discovery, the subrogation claim was also settled, this time resulting in complete diversity, and the case proceeded to trial. *Id.* Despite the error in failing to remand earlier, this Court determined that because complete diversity existed at the time of trial, "wip[ing] out the adjudication postjudgment, and return[ing] to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77. Thus, this Court held that the absence of complete diversity at the time of removal "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar*, 519 U.S. at 64.

In this context, the Court discussed the one-year limitation in the second paragraph noting that had Caterpillar waited until the case was ripe for removal (i.e. when the subrogation claim was settled), the one-year limitation

"would have barred the way." *Id.* at 75.[2] This Court did not rule that the one-year limitation applied to removal effected under the first paragraph of § 1446(b).

Finally, it is significant to note that the district court in this case, as well as the 9th and 6th Circuits, acknowledge Caterpillar and distinguish it on this very basis. *See* Pet. App. C, at p. 19a; *Ritchey*, 139 F.3d at 1317, and *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 535 n.4 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 790 (2000). There is simply no direct conflict with *Caterpillar* justifying review on certiorari.

II. CONFLICT WITH "A NUMBER OF DISTRICT COURT DECISIONS" WHICH ARE NOW ABROGATED BY LATER CIRCUIT COURT OF APPEALS' OPINIONS IS NOT A BASIS FOR REVIEW.

Petitioner string-cites several district court cases in apparent conflict with the 8th Circuit's decision in this case. *See* Pet. at p. 5. First, conflict with a district court decision is not a legitimate basis for review on certiorari under S. Ct. Rule 10. Second, it is important to note that with one exception, these cases arise in the 5th and 9th Circuits, which have now rejected the contrary holding in those cases. *See, e.g., Ritchey, supra*, and *Johnson v. Hublein, Inc.*, 227 F.3d 236 (5th Cir. 2000). The sole exception is a district court case out of West Virginia,[3] within the 4th Circuit that has not yet spoken directly on this issue.

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2. Even though the one-year limit does not apply here, Tokio Marine's first attempt at removal was actually within one-year of suit being filed. This removal was deemed premature after the then-recent ruling in *Murphy Bros., supra. See* Pet. App. C at pp. 21a-22a.

3. *Rashid v. Schenck Constr. Co.*, 843 F. Supp. 1081, 1086-87 n.6 (S.D. W.Va. 1993).

As noted above, every Circuit Court of Appeals that has addressed the issue presented here has taken the same view as the 8th Circuit in this case. These decisions include the following: *Gibson v. Chryler Corp.*, 261 F.3d 927 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 903 (Jan. 14, 2002); *Ritchey, supra*; *Brierly, supra*; *Johnson, supra*; *Baden v. RJR Nabisco, Inc.*, 224 F.3d 382 (5th Cir. 2000); and *New York Life Ins. Co. v Deshotel*, 142 F.3d 873 (5th Cir. 1998).

III. THERE IS NO CONFLICT WITH THE EXPRESS LANGUAGE OF § 1446(B) BECAUSE THE ONE-YEAR LIMITATION QUITE CLEARLY MODIFIES ONLY THE *SECOND* PARAGRAPH, APPLYING ONLY TO CASES THAT ARE NOT REMOVABLE WHEN FILED.

First, it should be noted that Petitioner fails to cite the first paragraph of § 1446(b) in her brief. Read together, it is evident from the express language of the statute that there are two alternative time limits in two separate paragraphs. One applies to cases that are initially removable, and the other to those that are not. This is already discussed at the outset of this Opposition, and will not be repeated. Suffice it to say, that the 5th, 6th, 9th and 8th Circuits all agreed that rules of usage and statutory construction "lead inevitably" to the conclusion that the one-year time limit modifies the *second* paragraph. And, therefore, it only applies to cases that were not removable to federal court when originally filed. *See* Pet. App. A at p. 4a; and *Brierly*, 184 F.3d at 534-535 (the one-year limit "can only be interpreted to modify the antecedent clause to which it is attached, and not previous sections of the text. If Congress had intended to place a one-year limitation on removal of all diversity cases, it surely would have chosen less obscure and counter-intuitive wording to accomplish that purpose").

Finally, Petitioner argues that the 8th Circuit's construction of § 1446(b) would "turn congressional intent on its head." Pet. at p. 7. First, if the statute is clear and unambiguous as it is here, there is no need to turn to legislative history as a guide to its meaning. *Ritchey*, 139 F.3d at 1316-1317. Nevertheless, the legislative history supports the 8th Circuit's reading of § 1446(b). While it is true that Congress added the one-year limit to § 1446(b) in 1988 to "reduc[e] the opportunity for removal after substantial progress had been made in state court," Petitioner fails to state that the amendment was to address problems created by elimination of parties, e.g. by settlement with a diversity-destroying defendant on the eve of trial. H.R. Rep. No. 100-889, p. 72, 1988 U.S. Code Cong. & Admin. News pp. 5982, 6032 ("The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. . . . Removal late in the proceedings may result in substantial delay and disruption."). In other words, congressional intent appears to be concerned about cases that become removable late in the game, not cases that are subject to removal when originally filed. This is consistent with placement of the one-year limitation in the second paragraph of § 1446(b). *See also Ritchey*, 139 F.3d at 1316-1317 (containing discussion of legislative history); and *New York Life Ins.*, 142 F.3d at 886-997 (same).

Moreover, contrary to Petitioner's argument, this policy concern of avoiding substantial delay and disruption on the eve of trial is not "equally applicable" to all diversity cases (Pet. at p. 7). As here, the **addition** of a new party to a case that was originally removable after the litigation progresses is always conditioned on obtaining leave of court or the written consent of the parties under F.R.C.P. 15. Leave of court can be denied at the district court's discretion if

substantial delay and disruption would result, especially if plaintiff was dilatory in adding the new party or others would be unduly prejudiced. Once added, the existing parties nearly always expect delay to permit the newly added party to develop its defenses. Removal under those circumstances would not cause any more significant delay or disruption than is already caused by adding a new party to the litigation. In contrast, the elimination of a party on the eve of trial — the situation addressed by the one-year rule — especially if it is by settlement, should be encouraged. Eliminating the possibility of removal following a late settlement that creates diversity jurisdiction for the first time furthers the long-standing policy favoring settlements.

Thus, there is simply no compelling policy reason why the express language of the statute should be ignored and the one-year limitation applied to all diversity cases as Petitioner argues.

CONCLUSION

The 8th Circuit correctly determined — along with the 5th, 6th and 9th Circuits — that the one-year limitation on removal of diversity cases applies only to those cases that are not initially removable. This is because customary usage and rules of statutory interpretation lead inevitably to the conclusion that the one-year limit, contained in the second paragraph of § 1446(b), modifies the antecedent clause to which it is attached, and not the preceding paragraph. Quite simply, there is no disagreement among the Circuits on this issue, no conflict with this Court's decision in *Caterpillar*, no conflict with the express statutory language, and no other "compelling reason" justifying review on certiorari. For these reasons, Petitioner's request should be declined and the Petition for Certiorari denied.

Respectfully submitted,

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